



6351-01-P

## **COMMODITY FUTURES TRADING COMMISSION**

**17 CFR Parts 1, 3, 23, 37, 43, 45, 46, and 170**

**RIN 3038-AE27**

### **Initial Response to District Court Remand Order in Securities Industry and Financial Markets Association, et al. v. United States Commodity Futures Trading Commission**

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Supplementation of rulemaking preambles and request for comments.

**SUMMARY:** This release is the Commodity Futures Trading Commission's ("Commission" or "CFTC") initial response to the order of the United States District Court for the District of Columbia in Securities Industry and Financial Markets Association, et al. v. United States Commodity Futures Trading Commission remanding eight swaps-related rulemakings to the Commission to address what the court held to be inadequacies in the Commission's consideration of costs and benefits, or its explanation of its consideration of costs and benefits, in those rulemakings. In this release, the Commission: supplements the preambles to the remanded rulemakings by clarifying that the costs and benefits identified therein applied both to domestic swaps activities and activities outside the United States that are subject to the Commission's swaps rules by operation of section 2(i) of the Commodity Exchange Act ("CEA"); and solicits comments on whether there are cross-border costs or benefits associated with the

remanded rules that differ from those associated with activities within the United States. Following its review of the comments, the Commission will publish a further response to the District Court remand order which would include any supplementation of or changes to its consideration of the costs and benefits of the relevant rules as set forth in the rule preambles. The Commission will also consider whether to amend any of these rules in light of information developed in this process.

**DATES:** Comments must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** You may submit comments, identified by RIN 3038-AE27, by any of the following methods:

- Agency web site: <http://comments.cftc.gov>. Follow the instructions for submitting comments through the web site.
- Mail: Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.
- Hand Delivery/Courier: Same as Mail, above.
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Please submit your comments using only one of these methods.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to [www.cftc.gov](http://www.cftc.gov). You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of

Information Act (“FOIA”), a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission’s regulations.<sup>1</sup>

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from [www.cftc.gov](http://www.cftc.gov) that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the FOIA.

**FOR FURTHER INFORMATION CONTACT:** Rob Schwartz, Deputy General Counsel, (202) 418-5958, [rschwartz@cftc.gov](mailto:rschwartz@cftc.gov); Martin White, Assistant General Counsel, (202) 418-5129, [mwhite@cftc.gov](mailto:mwhite@cftc.gov); or Kavita Kumar Puri, Counsel, (202) 418-5291, [kpuri@cftc.gov](mailto:kpuri@cftc.gov), in the Office of the General Counsel, Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st Street, NW, Washington, DC 20581.

## **SUPPLEMENTARY INFORMATION:**

### **I. Overview**

This release is the Commission’s initial response to the order of the United States District Court for the District of Columbia in Securities Industry and Financial Markets Association, et al. v. United States Commodity Futures Trading Commission, No. 13-1916 (PLF) (D.D.C. September 16, 2014)<sup>2</sup> (“SIFMA v. CFTC”) remanding eight swaps-related rulemakings to the Commission to address what the court held to be inadequacies

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<sup>1</sup> 17 CFR 145.9.

<sup>2</sup> -- F. Supp. 3d --, 2014 WL 4629567 (“Op.”).

in the Commission’s explanation of its consideration of costs and benefits in those rulemakings. The eight remanded rulemakings are:

Real-Time Public Reporting of Swap Transactions Data<sup>3</sup> (“Real-Time Reporting Rule”)

Swap Data Recordkeeping and Reporting Requirements<sup>4</sup> (“SDR Reporting Rule”)

Registration of Swap Dealers and Major Swap Participants<sup>5</sup> (“Swap Entity Registration Rule”)

Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflict of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants<sup>6</sup> (“Daily Trading Records,” “Risk Management,” and “Chief Compliance Officer” Rules)

Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant,” and “Eligible Contract Participant”<sup>7</sup> (“Entity Definition Rule”)

Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps<sup>8</sup> (“Historical SDR Reporting Rule”)

Confirmations, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants<sup>9</sup> (“Portfolio Reconciliation Rule”)

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<sup>3</sup> 77 FR 1182 (January 9, 2012).

<sup>4</sup> 77 FR 2136 (January 13, 2012).

<sup>5</sup> 77 FR 2613 (January 19, 2012).

<sup>6</sup> 77 FR 20128 (April 3, 2012).

<sup>7</sup> 77 FR 30596 (May 23, 2012).

<sup>8</sup> 77 FR 35200 (June 12, 2012).

Core Principles and Other Requirements for Swap Execution Facilities<sup>10</sup> (“SEF Registration Rule”)

The court directed the Commission to address explicitly whether the costs and benefits the Commission identified in those rulemakings apply to activities outside the United States, and to address any differences that may exist. In this release, the Commission takes two actions:

First, the Commission supplements the preambles to the eight remanded rulemakings by clarifying that, unless otherwise specified, the costs and benefits identified therein addressed both domestic swaps activities and overseas swaps activities subject to the Commission’s jurisdiction by operation of CEA section 2(i).<sup>11</sup> In considering those costs and benefits, the Commission considered all evidence in the record, regardless of whether the evidence pertained to activities in the United States or overseas. The rule preambles, including the Commission’s discussions of costs and benefits, reflect the Commission’s understanding that the swaps market operates across borders, that some regulated activity would occur overseas, and that Congress expressly provided that the Commission’s swaps regulations would apply to activities outside the United States to the extent of CEA section 2(i). As with other variations in the universe of covered swaps activities, where the record evidence contained no information indicating a material difference in costs and benefits based on the geographic locus of swaps activities, the Commission addressed its consideration of costs and benefits of the rules to all swaps activities to which the rules apply. In the small number of instances

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<sup>9</sup> 77 FR 55904 (September 11, 2012).

<sup>10</sup> 78 FR 33476 (June 4, 2013).

<sup>11</sup> 7 U.S.C. 2(i).

where commenters raised issues specific to overseas activities or provided data about those activities, the Commission addressed those issues and data.<sup>12</sup> Consistent with this approach, and subject to the limitations of the information available in the rulemaking records, the costs and benefits identified in the rule preambles applied to all covered activity within the Commission’s jurisdiction.

Second, the Commission is soliciting comments on whether there are costs or benefits of the remanded rules as applied to business activities outside the United States that differ from those of the rules as applied to activities within the United States. Following its review of the comments, the Commission will publish a further response to the District Court remand order which would include any supplementation of, or changes to, its consideration of the costs and benefits of the rules as set forth in the rule preambles. The Commission will also consider proposing changes to the rules based on information developed in this process and other relevant considerations.

## **II. Background**

### **A. The District Court Litigation and Decision**

On December 4, 2013, three trade associations sued the Commission in the United States District Court for the District of Columbia, challenging, on various grounds, the Commission’s Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations<sup>13</sup> (“Cross-Border Guidance”) as well as the extraterritorial application of fourteen of the rules promulgated by the Commission to implement the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>14</sup>

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<sup>12</sup> See *infra* n.52.

<sup>13</sup> 78 FR 45292 (July 26, 2013).

<sup>14</sup> Pub. L. No. 111-203, 124 Stat. 1376.

regarding swaps.<sup>15</sup> The fourteen challenged rules were promulgated by the Commission in twelve rulemakings.<sup>16</sup> On September 16, 2014, the court issued a decision, granting summary judgment to the Commission on most issues.

The court summarized the case by observing,

The majority of plaintiffs’ claims fail because Congress has clearly indicated that the swaps provisions within Title VII of the Dodd-Frank Act—including any rules or regulations prescribed by the CFTC—apply extraterritorially whenever the jurisdictional nexus in 7 U.S.C. § 2(i) is satisfied. In this regard, plaintiffs’ challenges to the extraterritorial application of the Title VII Rules merely seek to delay the inevitable.<sup>17</sup>

Major holdings by the court regarding the cross-border application of the Commission’s swaps rules included the following:

1. The Commission’s Cross-Border Guidance is not subject to judicial review because it is in part a non-binding general statement of policy and in part an interpretive rule, neither of which is subject to judicial review under the Administrative Procedure Act.<sup>18</sup>

2. Section 2(i) of the CEA is a self-effectuating provision that makes Commission swaps rules apply to business activities outside the United States to the extent they meet the test set forth in the statutory language.<sup>19</sup> No Commission

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<sup>15</sup> Op. at \*1, \*5. The plaintiffs were the Securities Industry and Financial Markets Association, the International Swaps and Derivatives Association, and the Institute of International Bankers. Op. at \*1.

<sup>16</sup> See Op. at \*5. Three of the fourteen challenged rules, informally identified by the court as the “Daily Trading Records,” “Risk Management,” and “Chief Compliance Officer” Rules, were promulgated as part of a single rulemaking. *Id.*

<sup>17</sup> Op. at \*42.

<sup>18</sup> Op. at \*34.

<sup>19</sup> Op. at \*34. Section 2(i), 7 U.S.C. 2(i), provides that the provisions of this Act relating to swaps that were enacted by the Wall Street Transparency and Accountability Act of 2010 (including any rule prescribed or regulation promulgated under that Act), shall not apply to activities outside the United States unless those activities—(1) have a direct and significant connection with activities in, or effect on, commerce of the

rulemaking is needed to make swaps rules extend to the geographic reach established by Congress in this provision.<sup>20</sup> Thus, the Commission's substantive rules regarding swaps do not need to specify their international scope since that was done by statute.<sup>21</sup>

3. Because Congress determined that the Commission's swaps rules apply to certain overseas activities and established the test for determining when the rules would apply to those activities, the Commission was not tasked with reconsidering the costs and benefits of those legislative decisions.<sup>22</sup>

4. Because section 2(i) establishes the extraterritorial scope of the Commission's swaps rules, the Commission can enforce those rules overseas relying on that provision. However, to the extent that it may be useful to develop a more refined interpretation of how section 2(i) applies in particular circumstances, the Commission has discretion to address those interpretive issues via either rulemaking or case-by-case adjudication.<sup>23</sup> Whichever choice it makes, the Commission is not required to define the precise scope of section 2(i) each time it promulgates a substantive swaps rule; it can address issues of the scope of section 2(i) as they arise.<sup>24</sup>

Based on these principles, the court held that the rules challenged by the plaintiffs apply to swaps activities outside the United States to the extent specified by section

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United States; or (2) contravene such rules or regulations as the Commission may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of this Act that was enacted by the Wall Street Transparency and Accountability Act of 2010.

Section 2(i)(2), regarding anti-evasion rules, was not at issue in the SIFMA v. CFTC litigation.

<sup>20</sup> Op. at \*33 ("As already noted, Section 2(i) provides the authority—without implementing regulations, see *infra* Section III.A—to enforce the Title VII Rules extraterritorially whenever activities" meet the test set forth in the statute).

<sup>21</sup> Op. at \*36-\*37.

<sup>22</sup> Op. at \*38.

<sup>23</sup> Op. at \*35.

<sup>24</sup> Op. at \*36-\*37.



2(i).<sup>25</sup> The court also held that, even though some commenters asked the Commission to address the geographical scope of the rules, the Commission reasonably determined not to address issues of geographical scope in these particular proceedings and to simply rely on the statute (i.e., section 2(i)) to define the rules' application to activities outside the United States.<sup>26</sup>

On the other hand, the court further held that, in the preambles for ten of the challenged rules, promulgated as part of eight rulemakings,<sup>27</sup> the Commission should have, but did not, state whether the costs and benefits identified in the rule preambles applied not only to domestic swaps activities, but also to swaps activities outside the United States.<sup>28</sup> The eight remanded rulemakings are listed above. Specifically, the court held that the Commission should have discussed whether and to what extent the costs and benefits as to overseas activity may differ from those related to domestic application of the rules.<sup>29</sup> On that basis, the court described the rules as "inadequately explained."<sup>30</sup> It stated, however, that it was "willing to assume for now" that the issue was "one of form and not of substance."<sup>31</sup> It also held that this perceived shortcoming was "not so serious as to favor vacatur" of the rules.<sup>32</sup> The court further reasoned that vacatur of these rules would "produce a bevy of disruptive consequences," in part because "after vacatur, U.S.-based swap dealers would be able to avoid Title VII

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<sup>25</sup> Op. at \*35.

<sup>26</sup> Op. at \*36.

<sup>27</sup> As noted above, three of the rules at issue were promulgated as part of a single rulemaking.

<sup>28</sup> Although the Commission believes that it was sufficiently clear that the discussion of costs and benefits in the rule preambles applied to all swaps activity within the Commission's jurisdiction unless otherwise specified, the Commission has declined to appeal the district court's ruling. Thus, the court's remand order is final and binding on the Commission.

<sup>29</sup> Op. at \*39-\*40.

<sup>30</sup> Op. at \*40, \*42.

<sup>31</sup> Op. at \*41 (internal quotation and citation omitted).

<sup>32</sup> Id.

regulations by engaging in transactions through their foreign subsidiaries and affiliates, even if the transactions' risk remained with the U.S.-based corporation.”<sup>33</sup> Based on its analysis of the statute and rules, the court determined that there “exists at least a serious possibility” that the affected rules would remain unchanged as a result of proceedings on remand to elaborate on the geographic element of the identified costs and benefits.<sup>34</sup> The court therefore remanded without vacatur the eight rulemakings encompassing the rules in question for the Commission to better explain its position on whether the costs and benefits identified in the rule preambles applied to overseas activities, and to explain any relevant differences.<sup>35</sup>

B. The District Court's Rulings on Consideration of Costs and Benefits

The district court remanded the eight rulemakings “for further proceedings consistent with the Opinion issued this same day.”<sup>36</sup> The court's opinion included a number of holdings and observations that provide guidance as to the actions the Commission must take on remand with respect to the consideration of the costs and benefits of the extraterritorial application of the rules in question.

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<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> Op. at \*41, \*42-43. The plaintiffs' challenge to the “Trade Execution Rule,” Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade, Swap Transaction Compliance and Implementation Schedule, and Trade Execution Requirement Under the Commodity Exchange Act, 78 FR 33606 (June 4, 2013), was dismissed for lack of standing. Op. at \*23. For three other rules—the “Large Trader Reporting Rule,” Large Trader Reporting for Physical Commodity Swaps, 76 FR 43851 (July 22, 2011); the “Straight-Through Processing Rule,” Customer Clearing Documentation, Timing of Acceptance for Clearing, and Clearing Member Risk Management, 77 FR 21278 (April 9, 2012); and the “Clearing Determination Rule,” Clearing Requirement Determination Under Section 2(h) of the CEA, 77 FR 74284 (December 13, 2012)—the court granted summary judgment to the Commission without reaching the merits because the plaintiffs did not identify comments submitted to the Commission during the rulemaking proceedings that raised issues regarding the extraterritorial applications of these rules or the associated costs and benefits. Op. at \*36 n.30.

<sup>36</sup> Op. at \*43.

1. The court held that, because Congress made the determination that the swaps rules apply overseas to the extent specified in section 2(i), CEA section 15(a) does not require the Commission to consider whether it is necessary or desirable for particular rules to apply to overseas activities as specified in section 2(i).<sup>37</sup> Indeed, the court explained, the Commission cannot, based on a consideration of costs and benefits, second-guess Congress's decision that swaps rules apply to certain overseas activities.<sup>38</sup> As a result, the court stated that "the only issues necessarily before the CFTC on remand would be the substance of the Title VII rules, not the scope of those Rules' extraterritorial applications under 7 U.S.C. § 2(i)."<sup>39</sup>

2. At the same time, the court held that, in considering costs and benefits of the substantive regulatory choices it makes when promulgating a swaps rule, the Commission is required to take into consideration the fact that the rule, by statute, will apply to certain overseas activity.<sup>40</sup> Thus, the Commission's consideration of costs and benefits of the application of the rule must encompass both foreign and domestic business activities.<sup>41</sup> The court held that the Commission failed to meet this requirement because, the court stated, in the cost-benefit discussions for the rules at issue the Commission did not give explicit consideration to costs and benefits specific to overseas activities.<sup>42</sup>

3. The court held that the Commission has discretion either to consider costs and benefits of the international application of swaps rules separately from domestic application or to evaluate them together, "so long as the cost-benefit analysis makes clear

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<sup>37</sup> Op. at \*38.

<sup>38</sup> Op. at \*39; see also id. at \*41 n.35.

<sup>39</sup> Op. at \*41.

<sup>40</sup> Op. at \*39.

<sup>41</sup> Id.

<sup>42</sup> Id.

that the CFTC reasonably considered both.”<sup>43</sup> The district court found that, at the time the rules at issue in the litigation were promulgated, foreign swaps regulations were still under development so that costs of possible duplicative regulation were hypothetical and did not have to be considered.<sup>44</sup> The court noted that this fact raised the possibility that the costs and benefits of the rules’ extraterritorial application “were essentially identical to those of the Rules’ domestic applications” so that the Commission “functionally considered the extraterritorial costs and benefits” of the rules “by considering the Rules’ domestic costs and benefits.”<sup>45</sup> However, the court concluded that it did not need to address that possibility because the cost-benefit discussions in the rule preambles gave “no indication” that this was so.<sup>46</sup> The court further noted that foreign swaps regulations passed since the promulgation of the rules at issue in the litigation “may now raise issues of duplicative regulatory burdens” but that “the CFTC may well conclude that its policy of substituted compliance largely negates these costs.”<sup>47</sup>

4. Finally, the court noted that “[p]laintiffs raise no complaints regarding the CFTC’s evaluation of the general, often unquantifiable, benefits and costs of the domestic application of the Title VII Rules.”<sup>48</sup> As a result, the court held, “[o]n remand, the CFTC would only need to make explicit which of those benefits and costs similarly apply to the Rules’ extraterritorial applications.”<sup>49</sup>

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<sup>43</sup> Op. at \*40.

<sup>44</sup> Op. at \*39.

<sup>45</sup> Op. at \*40.

<sup>46</sup> Id.

<sup>47</sup> Op. at \*41.

<sup>48</sup> Op. at \*41.

<sup>49</sup> Id.

### **III. Supplement to Preambles of Remanded Rulemakings Regarding the Scope of the Commission’s Consideration of Costs and Benefits**

The Commission hereby clarifies that it considered costs and benefits based on the understanding that the swaps market functions internationally, with many transactions involving U.S. firms taking place across international boundaries; with leading industry members typically conducting operations both within and outside the United States; and with industry members commonly following substantially similar business practices wherever located. The Commission considered all evidence in the record, and in the absence of evidence indicating differences in costs and benefits between foreign and domestic swaps activities, the Commission did not find occasion to characterize explicitly the identified costs and benefits as foreign or domestic. Thus, where the Commission did not specifically refer to matters of location, its discussion of costs and benefits referred to the effects of its rules on all business activity subject to its regulations, whether by virtue of the activity’s physical location in the United States or by virtue of the activity’s connection with or effect on U.S. commerce under section 2(i).<sup>50</sup> In the language of the district court, the Commission “functionally considered the extraterritorial costs and benefits,”<sup>51</sup> and this was because the evidence in the record did not suggest that differences existed, with certain limited exceptions that the Commission addressed.<sup>52</sup> For

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<sup>50</sup> The statement in the text reflects the Commission’s approach in its consideration of costs and benefits for all of its Dodd-Frank rules, unless otherwise specified for a particular issue or issues in a particular rulemaking.

<sup>51</sup> Op. at \*40.

<sup>52</sup> See, e.g., Portfolio Reconciliation Rule, 77 FR at 55945-46, 55948-49 & nn.79, 84, 98, 108 (considering ISDA data regarding U.S. and foreign firms, and factoring in European proposals); Risk Management Rule, 77 FR at 20177 n.104 (relying on UK FSA study); Swaps Entity Registration Rule, 77 FR at 2624-25 (stating in response to comments that Commission “does not believe that foreign-based Swaps Entities will bear higher costs associated with the registration process” and giving explanation); SDR Reporting Rule, 77 FR at 2192 (considering costs and benefits of swap identifiers, including in cross-border activities).

example, as the district court found, at the time of the promulgation of the rules at issue, foreign swaps regulations generally were still being developed so any costs associated with potentially duplicative or inconsistent regulations remained hypothetical.<sup>53</sup> Thus, as the court noted, the plaintiffs in SIFMA v. CFTC did not “identify any specific data that the CFTC failed to take into account.”<sup>54</sup>

#### **IV. Request for Comments**

As noted above, the district court stated that, on remand, the Commission “would only need to make explicit” which of the costs and benefits identified in the rule preambles “similarly apply to the Rules’ extraterritorial applications.”<sup>55</sup> In order to assist the Commission in determining whether any further consideration or explanation—beyond that contained in the original rule preambles and this release—is needed to respond to this mandate, the Commission requests comments on the following questions:

1. Are there any benefits or costs that the Commission identified in any of the rule preambles that do not apply, or apply to a different extent, to the relevant rule’s extraterritorial applications?
2. Are there any costs or benefits that are unique to one or more of the rules’ extraterritorial applications? If so, please specify how.
3. Put another way, are the types of costs and benefits that arise from the extraterritorial application of any of the rules different from those that arise from the domestic application? If so, how and to what extent?

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<sup>53</sup> Op. at \*39.

<sup>54</sup> Op. at \*39.

<sup>55</sup> Op. at \*41.

4. If significant differences exist in the costs and benefits of the extraterritorial and domestic application of one or more of the rules, what are the implications of those differences for the substantive requirements of the rule or rules?

Comments should specify, in the header of the comment, the particular rule or rules that they address. The Commission requests that comments focus on information and analysis specifically relevant to the inquiry specified by the district court's remand order. Consistent with the district court's holding that the Commission is not required to address the issue of what the geographical scope of its rules should be in the challenged rulemakings,<sup>56</sup> the purpose of this request for comments is to further consider the cross-border costs and benefits of the substance of the rules, not to initiate a process to address the rules' cross-border scope, which, as the district court held, is prescribed by section 2(i).<sup>57</sup> The Commission further requests that commenters supply the Commission with relevant data to support their comments.

Issued in Washington, DC, on March 4, 2015, by the Commission.

Christopher J. Kirkpatrick,

Secretary of the Commission.

NOTE: The following appendix will not appear in the Code of Federal Regulations.

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<sup>56</sup> Op. at \*36-\*37.

<sup>57</sup> However, as it has done in the past, the Commission will continue to consider the proper interpretation and application of section 2(i) in particular circumstances.

**Appendix to Initial Response to District Court Remand Order in Securities Industry**  
**and Financial Markets Association, et al. v. United States Commodity Futures**

**Trading Commission** – Commission Voting Summary

On this matter, Chairman Massad and Commissioners Wetjen, Bowen, and Giancarlo voted in the affirmative. No Commissioner voted in the negative.

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